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No. 06-481

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In The

Supreme Court of the United States

DEBRA LAWS,

Petitioner,

v.

SONY MUSIC ENTERTAINMENT, INC.,
dba EPIC RECORDS, a Delaware corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does Section 301 of the Copyright Act (17 U.S.C. § 301) preempt a state law right of publicity claim based solely on the reproduction and distribution of a copyrighted sound recording under license from the copyright holder?

LIST OF PARTIES

The parties to this matter are Petitioner Debra Laws and Respondent Sony Music Entertainment Inc. ("Sony Music"), a Delaware corporation. Sony BMG Music Entertainment ("Sony BMG"), a Delaware general partnership, is the successor in interest to Sony Music. Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Sony BMG certifies that Sony Corporation and Bertelsmann AG are the ultimate corporate parents of Sony BMG, and that Sony Corporation is the only publicly held company owning greater than a 10% interest in Sony BMG.

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PRELIMINARY STATEMENT

The Ninth Circuit restated the traditional two-part test embodied in 17 U.S.C. § 301 and agreed that, "as applied to the facts of this case," Petitioner Debra Laws's ("Laws") claim for violation of the right of publicity was preempted. *Laws v. Sony Music Entertainment, Inc.*, 448 F.3d 1134, 1139 (9th Cir. 2006). The court held that Laws's vocal performance, consensually fixed in a sound recording, was within the subject matter of copyright, and that the rights to reproduce and distribute it, which Laws claimed infringed her right of publicity, were equivalent to exclusive rights of the copyright holder. *See generally* 1 M. & D. Nimmer, *Nimmer On Copyright*, § 1.01[B] (2006 ed.) (preemption analysis under Section 301 consists of two elements: the nature of the rights granted under state law and the nature of the work in which such rights may be claimed).

The petition for a writ of certiorari should be denied because the Ninth Circuit's opinion is not in conflict with its own prior decisions or decisions of other Courts of Appeals, each of which involved claims for the appropriation of an individual's uncopyrightable persona for use in an advertisement, not for the mere reproduction of a specific copyrighted performance under license from the copyright owner. Laws's claim that the Ninth Circuit's decision conflicts with this Court's decision in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), also does not support granting the Petition. *Zacchini* resolved a potential conflict between a state law right of publicity claim and the First Amendment, which is not an issue here, not the preemptive reach of the Copyright Act.

RELEVANT FACTS

The Ninth Circuit opinion fully describes the facts of this case. As relevant here, it was uncontested that Laws recorded a vocal performance of "Very Special" pursuant to her contract with Elektra/Asylum Records (not a party to this action). Elektra/Asylum registered and owned the copyright in that sound recording of "Very Special," and licensed the right to reproduce it to Respondent Sony Music Entertainment Inc. ("Sony Music"). Sony Music reproduced and distributed portions of the sound recording in a phonorecord, and provided credit to Laws pursuant to her contract with Elektra/Asylum.

REASONS TO DENY THE PETITION

I. THERE IS NO CONFLICT BETWEEN THE NINTH CIRCUIT'S DECISION AND THIS COURT'S DECISION IN *ZACCHINI*.

In *Zacchini*, respondent, the operator of a television station, filmed petitioner's entire human cannonball act, despite his refusal to consent, and then telecast the performance on a nightly news program. 433 U.S. at 563-64. Petitioner sued, *inter alia*, for violation of his right of publicity under Ohio law. *Id.*, at 564. This Court's review was limited to "whether the First and Fourteenth Amendments immunized respondent from damages for its alleged infringement of petitioner's state-law 'right of publicity.'" *Id.*, at 565. The Court answered that question in the negative, holding that, under the unique facts of that case, the Constitution did not privilege the press from appropriating and broadcasting, without consent, Zacchini's entire act. *Id.*, at 578-79.

There is no conflict between *Zacchini* and the Ninth Circuit's decision. In *Zacchini*, the performance at issue was not copyrightable, and, therefore, preemption was not an issue before the Court. Conversely, the First Amendment was not the basis for the Ninth Circuit's decision here. Rather, Laws's right of publicity claims were preempted by Section 301 of the Copyright Act because, unlike Zacchini's live act, Laws's vocal performance was fixed in a copyrighted sound recording with her consent, and that work was licensed for reproduction by the copyright owner.[1]

II. THERE IS NO CONFLICT BETWEEN THE NINTH CIRCUIT'S DECISION AND ITS OWN PRIOR DECISIONS AND THOSE OF OTHER COURTS OF APPEALS.

Laws contends that the Ninth Circuit's decision conflicts with a decision of the Seventh Circuit in a case

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[1] Laws argues that "the plaintiff [in *Zacchini*] would have lost under the Ninth Circuit's analysis because the broadcaster owned the copyright to the videotape of the cannonball performance." Pet. at 12. That is incorrect. Since Zacchini's performance was not lawfully recorded, it could not vest copyright in the broadcaster. 17 U.S.C. §§ 301(b) ("works of authorship not fixed in any tangible medium of expression" not preempted), 101 (in order to be "fixed," a work must be embodied in a copy "by or under the authority of the author"). *See* III *P. Goldstein On Copyright*, § 17.17 at 17:169-70 (3d ed. 2006) ("Because the work in issue [in *Zacchini*] was not fixed with the plaintiff's permission, the result would be the same today. . . . Had Zacchini authorized the fixation of his work, he would have forfeited statutory protection for his performance under the Copyright Act."). The Court in *Zacchini* did note that, in the area of patents and copyrights, the states may not "conflict with the operation of the laws in this area passed by Congress." 433 U.S. at 577 n.13, *quoting Kewanee Oil Co. v. Bicron*, 416 U.S. 470, 479 (1974).

involving the advertising use of a likeness, and with two prior decisions of the Ninth Circuit in cases involving vocal *imitators,* also used for advertising purposes. The Ninth Circuit properly distinguished those decisions and, in denying Laws's petition for rehearing or rehearing *en banc,* correctly concluded that its decision was not in conflict with prior decisions of the court.

A. There Is No Conflict between the Ninth Circuit's Decision and Its Prior Decisions in Cases Involving Vocal Imitators.

Laws argues that the Ninth Circuit's decision conflicts with *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), *cert. denied sub nom. Young & Rubicam v. Midler*, 503 U.S. 951 (1992), and *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *cert. denied* 506 U.S. 1080 (1993). These cases involved the use of vocal imitators, without the plaintiff's consent, hired specifically to imitate the well-known and distinctive vocal styles of Bette Midler and Tom Waits. There was no reproduction of performances "fixed in a tangible medium" and subject to copyright. In contrast, here, Laws's ***actual*** vocal performance, ***as embodied in a specific consensual and copyright-protected sound recording***, was reproduced under license from the copyright owner.

In *Midler*, Ford Motor Co. and its advertising agency wanted to use a well-known Bette Midler song, "Do You Want to Dance," in a television commercial. 849 F.2d at 461. When the advertising agency was unable to secure Midler's involvement, it hired one of Midler's former backup singers "to 'sound as much as possible like the Bette Midler record.'" *Id.* The court held that Midler's claim for violation of the right of publicity under California

common law was not preempted because the "'[m]ere imitation of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another's performance as exactly as possible.'" *Id.*, at 462 ("statutory protection for sound recordings . . . would not prevent a separate recording of another performance in which those sounds are imitated"), *quoting* H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., at 106 (1976), *reprinted in* U.S.C.C.A.N. 5659, 5721. In *Waits*, the Ninth Circuit similarly rejected the claim of preemption, distinguishing its facts from situations like those present here: "Waits's claim, like Bette Midler's, is for infringement of voice, ***not for infringement of a copyrightable subject such as sound recording or musical composition***." 978 F.2d at 1100 (emphasis added).

Both *Waits* and *Midler* correctly grounded their decisions on the distinction between a right of publicity claim based on the use of a vocal imitator, and one based on the use of a specific "fixed" copyrighted vocal ***performance*** by the original singer. Because the former does not involve copyrightable subject matter, it does not implicate copyright law and there can be no preemption. Because the latter does involve copyrightable sound recordings and the exercise of a copyright owner's exclusive rights, the reproduction of vocal performance embodied in a sound recording necessarily implicates copyright law and is preempted.

In *Laws*, the Ninth Circuit reiterated this distinction:

> In this case, Laws's voice misappropriation claim is plainly different from the claims in *Midler* and *Waits* and falls within the subject matter of copyright. In contrast to *Midler* and *Waits*, where the licensing party obtained only a license to the song and then imitated the artist's voice, here

> Sony obtained a license to use Laws's recording itself. Sony was not imitating "Very Special" as Laws might have sung it. Rather, it used a portion of "Very Special" as sung by Debra Laws.

448 F.3d at 1140-41. Thus, *Laws* does not conflict with *Midler* and *Waits* for the very reason recognized in those cases and acknowledged and followed by *Laws*.

B. There Is No Conflict between the Ninth Circuit's Decision and the Seventh Circuit's Decision in *Toney*.

Laws also contends that the Ninth Circuit's decision conflicts with *Toney v. L'Oreal, U.S.A., Inc.*, 406 F.3d 905 (7th Cir. 2005). In doing so, Laws ignores that courts have drawn a clear line between cases involving the persona of an individual as used for advertising a commercial product (as in *Toney*) and those involving a particular artistic performance exploited only by the reproduction and distribution of that copyrighted performance (as in *Laws*).

In *Toney*, plaintiff, a model, licensed the use of her likeness for advertisements for hair care products. 406 F.3d at 905. When defendants used plaintiff's likeness beyond the agreed period, she sued, *inter alia*, for violation of her statutory right of publicity under Illinois law. *Id.* In discussing the preemption issue, the court concluded that plaintiff's "persona" was not fixed in a tangible medium of expression and did not come within the subject matter of copyright. *Id.*, at 909-10.

Toney involved the use of plaintiffs' ***likeness*** for advertising purposes, whereas this case involves a specific recorded ***vocal performance***, embodied in a copyrighted sound recording for the purposes of making phonorecords.

Here lies a critical distinction: a person's "likeness" – even when embodied in a copyrighted photograph – is not within the subject matter of copyright, and right of publicity claims based on the use of that likeness are independent of the copyrighted photograph and not preempted. A specific recorded ***vocal performance***, on the other hand, is within the subject matter of copyright, and right of publicity claims based on the mere reproduction of that ***vocal performance*** are identical to copyright claims and are preempted.[2]

That principle was recognized under California law and its rationale explained in *Fleet v. CBS, Inc.*, 58 Cal. Rptr. 2d 645 (Cal. Ct. App. 1996). Plaintiffs were actors whose performances were embodied in a copyrighted film. *Id.*, at 646. The actors were not paid fully for their performances, and brought an action for violation of their rights of publicity against CBS, which had acquired the copyright in the film and had telecast it. *Id.*, at 647. In holding that the actors' right of publicity claims were preempted, the court noted that, because a particular dramatic performance in a motion picture is copyrightable, actions based solely upon the exploitation of the copyrighted work embodying that performance are preempted.

> Appellants insist that neither of [the Section 301 conditions] is met and that their claims pose no threat to the federal scheme because a person's name, voice, likeness, and overall persona are

[2] The reproduction of Laws's recorded performance by Sony Music is analogous to the owner of a copyrighted photograph licensing it for reproduction and distribution in a book of photographs. Clearly, any claim for invasion of the right of publicity under those circumstances would be preempted.

> not copyrightable and assertion of these rights cannot be equivalent to those that fall under the Act's protection. We agree that as a general proposition Civil Code section 3344 is intended to protect rights which cannot be copyrighted and that claims made under its provisions are usually not preempted. But appellants' analysis crumbles in the face of one obvious fact: ***their individual performances in the film White Dragon were copyrightable***.... Here, ... ***it was not merely appellants' likenesses which were captured on film*** – it was their dramatic performances which are ... copyrightable.

Id., at 650 (emphasis added). The court concluded that "[a] claim asserted to prevent nothing more than the reproduction, performance, distribution, or display of a dramatic performance captured on film is subsumed by copyright law and preempted." *Id.*, at 653. *See also KNB Enters. v. Matthews*, 92 Cal. Rptr. 2d 713, 721 (Cal. Ct. App. 2000) ("*Fleet* stands for the solid proposition that performers in a copyrighted film may not use their statutory right of publicity to prevent the exclusive copyright holder from distributing the film.").

In *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. 2001), the Ninth Circuit recognized this distinction:

> In *Fleet*, the plaintiffs were actors in a copyrighted film. The claims of the plaintiffs were based on their ***dramatic performance*** in a film CBS sought to distribute.... [The facts of *Fleet* are] clearly distinguishable from this case where the Appellants' claim is based on the use of their names and likenesses, which are not copyrightable.

265 F.3d at 1005 n.4 (emphasis added). The other cases relied on by Laws (Pet. at 10) also have followed this rationale. *See Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 621, 623 (6th Cir. 2000) (claim for violation of Lanham Act by use of plaintiff's likeness in an action figure was not preempted, noting that plaintiff was "not claiming the right of publicity in order to gain rights in the telecast of his performance, or to contest Fox's right to create derivative works from its copyrighted work in general."); *Wendt v. Host International, Inc.*, 125 F.3d 806, 810 (9th Cir. 1997) (holding right of publicity claim for use of likeness in robotic figures not preempted because plaintiffs "are not seeking to prevent Paramount from exhibiting its copyrighted work[.]"), *cert. denied sub nom. Paramount Pictures Corp. v. Wendt*, 531 U.S. 811 (2000); *Brown v. Ames*, 201 F.3d 654, 660-61 (5th Cir. 2000), *cert. denied sub nom. Collectibles, Inc. v. Brown*, 531 U.S. 925 (2000) (holding claim for unauthorized use of name and likeness on recordings in which defendant and his licensee did ***not*** own the copyrights not preempted, and observing, "[o]nly if states allowed similar claims against authorized publishers or distributors of a work (whether through copyright or the public domain) would the purposes of the Copyright Act be adversely affected"); *see also Daboub v. Gibbons*, 42 F.3d 285, 289 (5th Cir. 1995) (state law claims based on wrongful copying, distribution, and performance of copyrighted lyrics was preempted).

This dispositive distinction between cases involving the intrinsic use of a particular fixed performance, such as in *Laws* and *Fleet*, and cases involving the unauthorized advertising use of a persona through a likeness, such as in *Downing* and *Toney*, is endorsed by the leading copyright treatise:

> [*Fleet*] presented a similar posture [as *Toney*], but with a crucial difference. . . . By upholding

> the baseline proposition that a "right is equivalent to rights within the exclusive province of copyright when it is infringed by the mere act of reproducing, performing, distributing, or displaying the work at issue," the court vindicated the "obvious conclusion that a party who does not hold the copyright in a performance captured on film cannot prevent the one who does from exploiting it by resort to state law."

1 M. & D. Nimmer, *Nimmer On Copyright*, § 1.101[B][1][c], at 1-28.2 to 1-29 (2006 ed.).

The Ninth Circuit recognized and applied the law as discussed above:

> Abercrombie went well beyond mere republication of the photograph. . . . We noted [in *Downing*] that the photograph itself was within the subject matter protected by the Copyright Act. But [defendant] Abercrombie had not merely published the photograph. Rather, it published the photo in connection with a broad surf-themed advertising campaign, identified the plaintiffs-surfers by name, and offered for sale the same t-shirts worn by the plaintiffs in the photo. By doing so, it had suggested that the surfers had endorsed Abercrombie's t-shirts. Accordingly, we concluded that "it is not the publication of the photograph itself, as a creative work of authorship, that is the basis for [plaintiffs'] claims, but rather, it is the use of plaintiffs' likenesses and their names pictured in the published photograph."

Laws, 448 F.3d at 1141, *quoting Downing*, 265 F.3d at 1003. The court later compared these facts to the different facts of *Fleet*, which it found "more on point":

> In effect [in *Fleet*] plaintiffs' right of publicity claim was a question of control over the distribution, display or performance of a movie CBS owned. Since CBS' use of plaintiffs' likeness did not extend beyond the use of the copyrighted material it held, there was no right of publicity at issue, aside from the actors' performances. Had the court held otherwise, each actor could claim that any showing of the film violated his right to control his image and persona.

448 F.3d at 1143.

The Ninth Circuit was careful to limit its decision that Laws's claims were preempted to the specific facts before it, *id.*, at 1139, and acknowledged that under its reasoning "not every right of publicity claim is preempted by the Copyright Act." *Id.*, at 1145. In particular, as noted above, the court recognized that the cases relied on by Laws involved a persona used in advertisements and that "Sony did not use Laws's image, name or voice recording in any promotional materials." *Id.*, at 1142. By contrast, in *Toney*, the court found invasion of the right of publicity by use of the plaintiff's identity on packaging of and advertising for a product, holding that "[t]he basis of a right of publicity claim concerns the message – whether the plaintiff endorses, or appears to endorse, the product in question." 406 F.3d at 910. Laws has never cited a case where the right of publicity was violated merely by the use of a copyrighted work, as authorized by the copyright owner, for its own intrinsic purpose and in a non-advertising context. *See Brown*, 201 F.3d at 660 ("currently . . . no state seems to have" a law that permits right of publicity "claims against authorized publishers or distributors of a work").

Sony Music did no more than reproduce and distribute (under authority of the acknowledged copyright owner), a copyrighted work embodying Laws's performance. For that reason, Laws's "state tort action ***challenges control of the artistic work itself*** and could hardly be more closely related to the subject matter of the Copyright Act." 448 F.3d at 1142 (emphasis added).

C. The Ninth Circuit's Decision Is Consistent with the Policy of the Copyright Law as Enunciated by This Court.

If Laws's position is sustained, the policy of uniformity of the laws governing copyrighted works that dictate federal preemption would be turned on its head. *See* H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., at 130 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5746 (noting "unqualified intention that Congress shall act preemptively, and to avoid any vague borderline areas between state and federal protection"). *See also Daboub*, 42 F.3d at 288 ("Section 301(b) accomplishes the general federal policy of creating a uniform method for protecting and enforcing certain rights in intellectual property by preempting other claims"). This is a particular danger in the context of the right of publicity, for the following reasons: First, a number of states have not recognized the right of publicity. *See ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 928 n.13 (6th Cir. 2003) ("Approximately half of the states have adopted some form of the right of publicity either at common law or by statute"). Second, the scope of protection provided by others states varies, including whether voice is protectible at all under the right of publicity. *Compare, e.g.*, Mass Gen. L. ch. 214, § 3A (voice not protected) *with* Tex. Stat. § 26.011 (voice protected). Third, state laws differ in other material respects, including, for example, the type of use that violates the right of publicity, the nature of exceptions

or exemptions, the duration of the right, and whether the right is descendable and, if so, for what term. Under Laws's construct, the unfettered ability of a copyright holder to exploit his or her exclusive rights would be subject to these vagaries and would change from state to state.

Additionally, under Laws's reasoning, instead of taking precedence over state law claims, federal copyright protection would become subservient to myriad state law claims that could be invoked to prevent copyright owners and their licensees from freely exploiting the works in which they invested and which they own or control. As the Ninth Circuit correctly observed,

> [T]he right of publicity is not a license to limit the copyright holder's rights merely because one disagrees with decisions to license the copyright. We sense that, left to creative legal arguments, the developing right of publicity could easily supplant the copyright scheme. . . . It is hard to imagine how a copyright would remain meaningful if its licensees were potentially subject to suit from any performer anytime the copyrighted material was used.

Laws, 448 F.3d at 1145.[3] Ultimately, if there is no preemption under the facts presented here, owners of copyrights

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[3] The court explained that Laws (or any other performer) was not without remedy, as she could have contracted (as she claimed to have done) to limit the copyright owner's right to reproduce her performance. *See* H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., at 132 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5748 ("Nothing in the bill derogates from the rights of the parties to contract with each other and to sue for breaches of contract"). The court did not opine on the merits of such a claim but noted that, under those circumstances, Laws's claim would be against her contracting party, Elektra/Asylum, not the licensee of the copyright, Sony Music. 448 F.3d at 1145. *See Fleet*, 58 Cal. Rptr. 2d at 651 ("an actor who wishes to protect the use of the image contained in a single, fixed dramatic performance need simply retain the copyright").

would be handcuffed from exploiting their copyrighted works for the very purpose for which they were created, and the transfer of copyrights would be severely impeded. As a result, the preeminent goal of the copyright law – to benefit the public by encouraging creativity – would be stifled. *See, e.g., Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return to an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."); *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003) ("copyright law serves public ends by providing individuals with an incentive to pursue private ones").

CONCLUSION

It is respectfully submitted that the Petition for Certiorari should be denied.

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